No. 15826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CECIL M. JACKSON, Bankrupt,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M. Jackson,

Appellee.

APPELLEE'S BRIEF.

HUBERT F. LAUGHARN,
ANDREW F. LEONI,
JOSEPH S. POTTS, JR.,
Suite 817,
111 West Seventh Street,
Los Angeles 14, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 15826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CECIL M. JACKSON, Bankrupt,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M. Jackson,

Appellee.

APPELLEE'S BRIEF.

Statement of Case.

The question here on appeal pertains to the sufficiency of a Declaration of Homestead which was executed and recorded by the bankrupt and his wife and whether or not the same meets the requirements of Section 1263 of the California Civil Code, with particular reference to subdivision (3) thereof—one of the formal requirements which pertains to description of the real property claimed as exempt.

Apparently through oversight, no description of any kind was inserted in the declaration.

The District Judge in reversing the Referee, found the said Declaration of Homestead did not comply with the provisions of Section 1263 in that it did not set forth a

description of the real property claimed as exempt and, further that the Declaration of Homestead was a nullity and the bankrupt was not entitled to a claim of exemption by virtue thereof.

As shown by the records herein, there had been a former Declaration of Homestead recorded which was abandoned. Thereafter the imperfect Declaration of Homestead was recorded.

Contentions of Appellant.

The appellant argues that the United States District Judge should have, and this Court should, apply such a rule of liberality as would determine that the formal requirement for the setting forth of the description of the premises claimed as exempt (Sec. 1263(3)) be deemed complied with because the said Declaration of Homestead under subdivision (6) thereof (no former Declaration of Homestead has been made by them, or either of them except as follows): The following was inserted, "The former Declaration of Homestead was abandoned on or about March 12, 1954." The appellant urged this on the review before the District Judge without success.

Formal Requirements.

As aforesaid, one of the formal requirements of said Section 1263(6) is the statement: "that no former declaration has been made, or, if made, that it has been abandoned—."

Under California law it is only possible to have one claim of Homestead exemption at any given time. The statement that: "The former Declaration of Homestead was abandoned on or about March 12, 1954," does not indicate that the former Declaration of Homestead was

on the same property. From the face of the present Declaration of Homestead, it well could be that the abandonment referred to was on a former home of the appellant, for example in the County of San Diego. The said statement does not indicate in which county of the State of California the instrument of abandonment of homestead might be found. Likewise the statement does not indicate the abandonment was recorded at any particular place. Therefore, the argument of appellant that sufficient clues were provided in the "descriptionless" declaration as would direct a person on to a search (1) which would eventually lead to the discovery of an instrument of abandonment, (2) which instrument would contain a legal description, (3) which upon further investigation could be established as pertaining to the same premises as purportedly covered by the questioned Declaration of Homestead.

Such collateral research and investigation does not come under the heading of the most extended liberal construction as contended for by the appellant here.

In final analysis, we believe the observation of Circuit Judge Richard H. Chambers as expressed in the recent case of *Lynch, Trustee v. Stotler,* 215 F. 2d 776 at 778, is as apt here as it was in that case:

> "Although homestead exemptions are a creature of statute and not of common law, we are bound to and we do accept the idea that the statute should not be too strictly construed. But where the homestead requires as a condition of its existence the performing of certain acts and some of them have not been performed, we find no California case that would justify us in reading statutory requirements out of the statute. As we have construed the declaration, the bankrupts did little more than say in writing, 'We want a homestead.'

"We think we are compelled to deny the homestead on the basis of the underlying reasoning of the following California cases: Rich v. Ervin, 86 Cal. App. 2d 386, 194 P. 2d 809; Crenshaw v. Smith, 74 Cal. App. 2d 255, 168 P. 2d 752; Schuler-Knox Co. v. Smith, 62 Cal. App. 2d 86, 144 P. 2d 47; Reid v. Englehart-Davidson Co., 126 Cal. 527, 58 P. 1063; Ames v. Eldred, 55 Cal. 136; Ashley v. Olmstead, 54 Cal. 616."

Determinations of This Court With Respect to Homestead Exemptions.

Counsel for the appellee have been before this Court in the recent cases involving homesteads and exemptions in bankruptcy proceedings. We have likewise appeared in the past forty years in quite a number of matters before the District Judges on the said exemption problem arising in bankruptcy estates upon which no appeals to this Court followed.

The most recent decision by this Court in which we appeared was the *Lynch, Trustee v. Stotler* case above referred to, in which case this Court reversed the United States District Judge and held in effect that the "formal requirements" of Section 1263 of the Civil Code meant "formal" in every sense of the word and the failure to fill in and provide the estimate of actual cash value, made the Declaration of Homestead fatally defective.

We were also before this Court in the recent case of *England v. Sanderson,* 236 F. 2d 641, and were permitted by this Court to file a brief *amicus curiae* and also attend and argue the matter in San Francisco at the time of the presentation of the appeal.

We also represented the trustee in bankruptcy in the case of *Sampsell v. Straub,* 189 F. 2d 379, which decision

held that the Declaration of Homestead filed after bankruptcy was valid. A Petition for rehearing was granted and we appeared at the reargument and resubmission of the said case, to-wit: *Sampsell v. Straub,* 194 F. 2d 228, which determined that the Declaration of Homestead was not effective because not recorded prior to bankruptcy.

Because of our continued interest in the matter of exemptions in bankruptcy estates, we would like to place before this Court all of the cases which we have accumulated on this subject, both for and against the proposition here argued by us. In effect, none of the cases are contrary to our argument here and the fact is that these cases which might be termed to be adverse to our position, contain declarations with respect to certain matters which are easily distinguished from the glaring omission we have here.

Attention is called to the six cases referred to hereinabove in the *Lynch, Trustee v. Stotler* case which were relied upon by this Court in that case. We will cite hereinafter quite a number of additional cases which could have been placed in this category.

Most of the authorities to which we will refer to are contained in the recent case of *Johnson v. Brauner,* 131 Cal. App. 2d 713. In this case the District Court of Appeal on March 22, 1955, affirmed the judgment of the Superior Court (Opinion by Judge Ashburn). Frankly, we have no argument with that opinion or in fact, its result, except, possibly, the citing therein of the *Stotler* case and reference in it to the decision of United States District Judge in 114 Fed. Supp. 301 in support of the so-called liberality rule without noting the fact that almost six months to the day before the *Johnson* case, this Court had reversed the said *Stotler* case (215 F. 2d 776).

Cases (in Addition to Those Set Forth in the Lynch, Trustee v. Stotler Case) Which Hold That the Declaration of Homestead as Being Deficient or Imperfect and That the Formal Requirements of the Statute Not Having Been Met, the Declaration of Homestead Was Rendered Ineffectual.

Jones v. Gunn, 149 Cal. 687. Declaration contained description of property and also all other land owned by the husband. Declaration determined by the California Supreme Court to be imperfect.

Beck v. Soward, 76 Cal. 527. Imperfect execution and acknowledgment of Declaration of Homestead renders declaration void.

Boreham v. Byrne, 83 Cal. 23. Declaration imperfect which did not state that the residence of the declarant and family was on the premises and cannot be made sufficient by actual proof of such residency.

Cunha v. Hughes, 122 Cal. 111. Declaration of Homestead by wife which does not contain statement that husband has not made declaration and she made same for joint benefit is ineffectual.

> *Tappendorff v. Moranda,* 134 Cal. 419. "The right to a homestead, and to enjoy the privileges and immunities incident thereto—exists only upon a compliance with the requirements of the statute. What the statute has specifically prescribed as a requisite for impressing the incidents of a homestead upon a tract of land is mandatory, and cannot be dispensed with —actual cash value must be given and not 'actual cost value.' "

Morand v. Hoyerdahl, 38 Cal. App. 77. The statute at that time required declaration to show declarant, if married and head of a family, etc., and where statement

showed declarant head of family, but did not state he was married, declaration was ineffectual.

Olds v. Thorington, 47 Cal. App. 355. Declaration of Homestead is not effectual where it does not contain one of the formal requirements, to wit: the statement that the person making it is residing on the premises.

Booth v. Galt, 58 Cal. 254. Declaration invalid where married woman did not state that her husband had not made declaration and that she made same for joint benefit.

Hansen v. Union Savings Bank, 148 Cal. 157. Same as above case.

Santa Barbara Lumber Company v. Ross, 183 Cal. 657. Declaration ineffectual unless formal requirements of statute are met.

The above cases are some of the principal cases which point out the necessity for the compliance with the provisions of the statute with respect to the form and substance of the Declaration of Homestead.

Cases Cited by Appellant.

The following cases have been cited by the appellant in support of his contention that the Order of the United States District Judge should be reversed. We do not believe a single one of these cases supports the contentions of appellant.

The following group of cases are cited to demonstrate the proposition as asserted by the appellant:

> "that homestead law is predicated on public policy; their purpose being to promote a healthy social order and prevent insolvent persons from becoming homeless; that the homestead laws are to be given a liberal construction in order to advance the beneficial objects

> and to carry out the manifest purpose of the legislature; that the homestead laws should be given a liberal interpretation is not a rule of law resting on 'maudlin sentimentalism,' *and to apply a strict interpretation of this statute would defeat the purpose for which the statute was enacted.*"

Schmidt v. Denning, 117 Cal. App. 36. The homestead in this case being permitted upon a building consisting of flats, in one of which the homestead declarant was residing.

Phelps v. Loop, 64 Cal. App. 2d 332. In this case the Declaration of Homestead covered a building occupied by the family, part of which was used to supplement the family income. The Declaration of Homestead was valid.

Rich v. Ervin, 86 Cal. App. 2d 386. A Declaration of Homestead must contain certain information and the statement of an untruth relative to an essential requirement vitiates the document. The mode in which a homestead is to be created as well as the legal incidents which attached to its existence are purely statutory (13 Cal. Jur. 427). The provisions relating to the acquisition of a homestead are construed to be mandatory.

Greenlee v. Greenlee, 7 Cal. 2d 579. Action instituted by wife against husband for separate maintenance upon ground of desertion. Judgment in favor of wife. In addition to $50 a month gave possession to real property to wife. Contention that no valid Declaration of Homestead ever declared thereon by wife. Court found that while residing on premises, wife recorded Declaration of Homestead stating property was home of herself and husband. Declaration recorded after husband left wife. Court held sufficient compliance and homestead declared valid.

Johnson v. Brauner, 131 Cal. App. 2d 713. We have heretofore commented on this case and reported numerous authorities therefrom. However, the case itself because of the factual basis bears no support to the argument of the appellant herein.

We believe the case fairly presents both sides of the problem, although it may be there is an indicated leaning in favor of liberality and alleviation from strict compliance with the statute. On the other hand, the *Johnson* case possibly does keep within the permissible bounds of liberality of construction in that it merely determined that the declaration by the wife on property owned by her and her husband as joint tenants substantially complies with the statutory provisions, although it did not contain the statement in the words of the statute, *i. e.,* "that she therefore makes the deeclaration for their joint benefit." The Court pointed out it contained all of the requisite matters (including the legal description of the premises) other than such assertion and including the statement that no former Declaration of Homestead had been made by her or her husband.

We respectfully urge that the reasoning in this decision cannot be used to supply the missing legal description in the Declaration of Homestead in the instant case.

Further Cases Cited by Appellant.

Oktanski v. Burn, 138 Cal. App. 2d 419. The Court stated at page 421:

> "In the instant case Mr. and Mrs. Oktanski complied with the statutory requirements, and the declaration of homestead correctly described the property as '740-742 Junipero Avenue' in Long Beach. The only inexactitude therein lies in the fact that, follow-

ing the semicolon after the street address, the declaration also states, 'or as Lots 1877 and 1878 of Tract Number 5134,' which was an incorrect legal description of Number 740-742 Junipero Avenue. The property was further identified as a duplex.

"It is conceded in appellants' brief that 'the street address alone would be sufficient as a description for the purpose of homestead,' but it is contended that here 'we have two complete descriptions of two entirely different properties'; for which reason the declaration is fatally defective.—

"It is true that a valid homestead declaration should contain a reasonably correct description, but it is not true that absolute perfection is required. In the instant case the street number is correctly given and no one could be misled by believing that any property was intended other than 740-742 Junipero Street.—"

Richie v. Anchor Casualty Company, 135 Cal. App. 2d 245. The opinion in this matter is written as was that in the case of *Johnson v. Brauner* by Judge Ashburn. However, it does not concern itself with the homestead exemption problem and merely involves an interpretation of a certain comprehensive liability policy and various riders attached thereto.

Joyce v. Tomasini, 168 Cal. 234. This case does not involve a Declaration of Homestead or the formal requirements thereof and it pertains to an executory contract to lease a specified acreage of tule land. The same omitted the state or county in which the land was situated, but did give as boundaries of the land the name of individuals. The Court held that the description was so uncertain that specific performance could not be enforced. The Court indicated the uncertainties could be overcome by extrinsic

evidence that the defendant was the owner of the specific acreage, etc.

The search in the *Joyce* case was for the establishment of the intention of the parties. However, the same rule does not apply to the Jackson homestead. We must assume that the appellant wanted a homestead. We cannot read his intention into the recorded Declaration of Homestead and thus insert the description. Thus, unfortunately the appellant did no more than to say, "I want a homestead." (See *Lynch, Trustee v. Stotler, supra.*)

Marcone v. Dowell, 178 Cal. 396. We do not believe the facts in this case have any bearing whatsoever on the present problem. The decision merely indicates that a deed of conveyance which covered certain property and likewise excluded certain parts thereof as covered by a mortgage which was recorded (and without any other description thereof) could be augmented to show the intention of the parties by reference to the said recorded mortgage. To have any application on the instant case, it would almost be as if the appellant had stated in his Declaration of Homestead:

> "I claim a homestead on certain property which I acquired from Smith twenty years ago and my deed was recorded. So, if any creditor or party in interest wants to know what property I am claiming to homestead on, they can go to the County Recorder's Office, attempt to locate my original deed, take the description and in effect read it into my Declaration of Homestead."

Donnelly v. Tregaskis, 154 Cal. 261. In this case cited by the appellant, the Court stated with respect to the Declaration of Homestead at page 262:

> "All of this presupposes the recordation of a valid declaration of homestead—the declaration—set forth

> —on the lot of land and premises situate, lying and being in the city of Vallejo, county of Solano, state of California, bounded and described as follows, to wit: 'being lot No. 14 in block No. 266, according to the map of said Vallejo made by C. W. Rowe, surveyor.' A description of the premises is required by the code as an essential to a valid declaration of homestead. (Civ. Code sec. 1263; Jones v. Gunn, 149 Cal. 687.) A description of the premises necessarily means such description as will serve to identify the property—No such map was produced in evidence, and the negative was shown by the defense to the effect that no such map was of record. In the absence of the production and identification of the map, it would be impossible for any person to locate the premises sought to be described.—"

In other words the decision intimates that the map might have been produced.

This apparently was not done. However, in arriving at the final decision, the above was more or less surplusage for the Court stated: "But, upon another consideration, equally beyond question, the judgment of the trial court was sound." Defendant pleaded title by adverse possession and statute of limitations. The husband, who apparently returned to California and sought to recover the property, which had been homesteaded prior to his divorce and which had been transferred by the wife to Mrs. Tregaskis, was unsuccessful and Mrs. Tregaskis was permitted to keep her home.

Matter of Estate of Caroline Ogburn, Deceased, 105 Cal. 95. This case is commented upon in the case of *Donnelly v. Tregaskis.*

> "It is contended that the declaration of homestead offered in evidence was void, because it describes no

property. This contention cannot be maintained. The declaration stated that the family then resided upon the lot and premises—and this statement, together with the description which followed, clearly enough designated the premises intended to be claimed as such homestead."

The description set forth in the Declaration of Homestead in addition to the statement that the husband and wife were residing thereon with their family was as follows:

> "Situated on Main Street, of the village of Woodland, and being the western part of lot No. (5) five of said village as laid out by F. S. Freeman's division of said village, the same being thirty-seven feet front on Main Street of said village of Woodland, and extending back with parallel lines one hundred and ninety feet deep, it being a part of the southeast quarter of section 21, in Township No. 10, of range 2 east."

Other than this fact of recitation of residence in both cases, we see no other similarity either in the facts or on the law with the Jackson Declaration of Homestead.

Ornbaum v. His Creditors, 61 Cal. 455. This case involved state court insolvency proceeding before the Bankruptcy Act of 1898 and particularly the validity of a recorded Declaration of Homestead. The description therein recites that the homestead was bounded as follows:

> "On the north by Ranchera Creek; on the east by the ranches of Robert Stubblefield and Paddy Adams; on the south by what is known as Redwood Mountains, and on the west by Camp Creek. That said boundary embraced about eleven hundred acres. That at the time said declaration was filed the lands were Government lands of the United States."

The Court held that the necessary essentials or formal requirements were present and that the homestead was valid and as to the description observed:

> "It would be sufficient to pass the land in a conveyance, and we do not think the Act of April 28, 1860—require a more particular description in a Declaration of Homestead than is required in a deed. It would be a novel proposition of law in this State, that a mountain, or range of mountains, is not a definite boundary of land, etc."

We certainly do not believe this case is authority for the inserting of a description in the Jackson homestead when none existed in the instrument as recorded.

The Following Additional California Cases Comment Upon the Sufficiency or Insufficiency of the Declaration of Homestead.

Schuyler v. Broughton, 76 Cal. 524. A statement in the Declaration of Homestead that the value of the land is "not to exceed sixteen hundred dollars" was held to be sufficient to meet the said formal requirement of Section 1263 of the Civil Code. This case also determined the formal requirement of the Section with respect to the description of the property was met with the following description:

> "The lot of land and premises situated in the Lompoc valley, county of Santa Barbara, state of California, bounded and described as follows: Being the northwest quarter of subdivision No. 11, as laid down on the official map of Lompoc Valley Land Company's lands, and contains forty acres of land, more or less."

In addition to the above cases, we cited the following cases in our Memorandum filed with the District Judge on the occasion of the review, to wit:

Strangman v. Duke, 140 Cal. App. 2d 185. Declaration of Homestead by wife (which did not contain a statement that the husband had not made a declaration) is void.

At first blush, this seems a rather harsh interpretation. It might be said that the negative fact that the husband had not filed a Declaration of Homestead could be ascertained by looking in the records of the County Recorder's Office in somewhat the same manner as the appellant here insists could be done to supplement the original declaration. But, it must be kept in mind that this would take a search of the County Recorder's Office in every county in the State of California before the negative result could be conclusively shown.

Olds v. Thorington, 47 Cal. App. 355. Failure to state in declaration that declarant was living on premises made the declaration imperfect and void.

Harris v. Duarte, 141 Cal. 497. Description of the premises on which the declarant resided was not the exact one as set forth in the declaration. The Court held the error to be fatal, stating:

> "A Declaration of Homestead must contain a description of the premises claimed and a statement that the person making it is residing on the premises described."

> *Carey v. Douthitt,* 140 Cal. App. 409. "The sufficiency of a Declaration of Homestead must be determined from the statement expressly made therein and cannot be affected by any secret intention which may have been in the mind of declarant."

United States District Judge Affirms Order of Referee (No Appeal).

In re Mapes, 120 Fed. Supp. 316. This 1954 decision of United States District Judge Ernest A. Tolin, Southern District of California, Central Division affirmed an Order of the Referee. From the decision at page 317:

> "State exemption statutes generally receive '* * * the most liberal construction which the courts can possibly give them.'—
>
> "Of equal dignity with this rule is the sequela that the District Court is bound to accept the State law as it has been declared by the California courts. Erie R. Co. v. Tompkins, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188—
>
> "The attempt is to procure from the District Court a more liberal construction of the Homestead Law than the courts of California have consistently followed.—
>
> "In construing a preceding, and very similar, section of the Code, the California Supreme Court said (in 1880) that provisions prescribing what shall be contained in a declaration of homestead are mandatory and not merely directive, and that compliance with them is essential to the validity of the homestead. The Court indicated that although such statutes might be generally subject to a liberal construction, the language 'must contain' is plain and requires no construction. Ashley v. Olmstead, 54 Cal. 616."

The Court concluded that the failure to give in the Declaration of Homestead of the seemingly unimportant point of the "formal requirement" of the (1)—name of the wife) rendered the Declaration of Homestead ineffectual and void.

It is conceded that many California cases refer to the homestead statute as "a remedial measure and to be liberally construed." (*Schuyler v. Broughton,* 76 Cal. 524.) This rule of course has its limitations and we know of no instance where such liberality has done away with the requirements of the statute to the point of eliminating one of the "formal requirements" of the declaration.

Section 1263(5) of the Civil Code in part provides for the statement in the declaration that: "No former declaration has been made, or, if made, that it has been abandoned." Obviously this does not necessarily refer to a declaration on the same property. In California, if at the time of recording the declaration, the person resides on the property and later moves off the homestead is valid forever and can only be lost by transfer or recorded abandonment.

So the question to be answered is in effect: "Do you have any valid and outstanding declaration on this or any other property in California?"

In speaking of liberal construction, non-essentials, etc., it is quite likely that if the above question was answered "no" or "none" and then it appeared to the contrary that the declarant had in years past had a homestead which had been released by sale or by recorded abandonment, that the failure to mention this additional fact (although suggested by the statute) was of no particular importance and a "liberal" construction of the statute could very well condone the omission. It is as to matters of this character that the liberality rule operates and not as suggested by appellant, to waive any of the so-called "formal requirements" of the declaration.

Conclusion.

Is the Rule Harsh or Unfair?

We must admit that the rule which is clearly stated by the California Courts as above pointed out (*i. e.,* that the "formal requirements" as required by the statute must be complied with) *is* a firm and positive rule. Not that it is not an unfair rule, although compliance is imperative and failure is fatal.

But, it is not an unfair rule.

Exemption Statutes—Rights to the Debtor, but Also Rights to the Creditor.

The legislative enactments upon the subject of exemptions is a grant to the debtor and a deprivation as against the creditor.

In any one of the above cases, outside evidence could no doubt have been brought forward to show the intention of the declarant or to provide the omitted portion, such as:

1. The name of the wife or husband;
2. The "actual cash value" of the property;
3. The description;
4. The fact as to any other declaration;
5. The fact of residence on the property;

The fact that declarant is required insofar as homestead exemptions are concerned that the debtor furnish the creditor body with certain information in recorded form open to the world. This information (*i. e.,* the right to information to the creditor) is the basis and necessity for the "formal requirements" of the statute.

From a standpoint of production of evidence to fortify an uncertain document, one might assume that the inten-

tion of the declarant, the description of the property, the value thereof, the name of the wife, the fact as to whether or not there was a present outstanding declaration, etc., might be brought forward to explain deficiencies of the recorded declaration.

As originally enacted in 1872, subdivision 3, Section 1263, required "a description of the premises." Section 1263 has been amended a number of times, in 1873-74, 1901, 1905, 1927, 1943, and 1953. See West's Annotated California Codes, page 242, Civil Code Vol. 8. If at any time the Legislature had intended to change the requirement of a description of the real property, it would have been very simple to have made it read "(3) a description of the premises; (or reference to former homesteads abandoned which contain a reasonable description of the property)." (Parenthetical matter ours.)

However, as pointed out in the above cases, it is not possible to thus fortify an imperfect declaration. Why must Declarations of Homestead be recorded? For the information of the creditor world and those dealing with a person who desires to place the asset beyond the reach of creditors.

We will attempt to set forth the reason why such evidence cannot be used to breath life into an imperfect declaration and we will concede that in the law of contracts where the search is for the intention of the parties, evidence thereon can be brought forward to supply the deficiencies. Why cannot a person file a declaration which merely states: "I want a homestead"?

The reason is this: exemptions are in effect road blocks or detours in the debtor-creditor commercial world. The Legislature thereby takes a very substantial right from the creditor.

Several of the cases above referred to comment on the rights of creditors to rely upon the declaration as recorded without the necessity of further search or investigation. And that concomitant right passed to the creditors when the right of recourse against the homesteaded property passed from them.

It is a rule of logic and fairness. It is firm, but not harsh or unfair and most certainly it is not a "rule of law resting on maudlin sentimentalism."

Respectfully submitted,

HUBERT F. LAUGHARN,
ANDREW F. LEONI,
JOSEPH S. POTTS, JR.,
Attorneys for Appellee.